No. 15612

IN THE

United States Court of Appeals For the Ninth Circuit

CRESCENT WHARF & WAREHOUSE COMPANY, ET AL,
Appellants

v.

WARREN H. PILLSBURY, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of California, Southern Division

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This appeal presents the questions of whether the court below properly applied Rule 25(d) of the Federal Rules of Civil Procedure to a statutory proceeding to review a compensation order made by a deputy commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-50,[1] and

[1] This statute will hereafter be referred to as "the Act."

whether, regardless of the applicability of Rule 25(d), the court correctly held that the action had abated as a matter of law.

Appellees adopt appellants' Jurisdictional Statement and Statement of the Case which accurately set forth the facts relevant to these questions.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 25(d) of the Federal Rules of Civil Procedure provides:

> (d) Public Officers; Death or Separation from Office. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting therto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Rule 81(a)(6) of the Federal Rules of Civil Procedure provides in pertinent part:

> (6) These rules apply to proceedings for enforcement or review of compensation orders under

the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. * * *

SUMMARY OF ARGUMENT

Because of the failure to make a timely substitution of the deputy commissioner's successor in office, the district court was required to dismiss the action as abated. The Federal Rules of Civil Procedure are expressly made applicable to a proceeding against a deputy commissioner to review and set aside a compensation order issued under the Longshoremen's and Harbor Workers' Compensation Act, and under Rule 25(d) an action against a public officer can be continued and maintained after his separation from office *pendente lite* only if his successor is substituted within six months from the time he ceases to hold office. Admittedly, the requirements of the rule were not complied with in the instant proceeding. Although the right of action being enforced in this proceeding is maritime in nature, the suit can be brought on the civil side of the district court, and, under the decision of this Court in *Haddock* v. *Pillsbury,* the case must then be governed by the rules of civil procedure rather than the rules applicable to admiralty proceedings. While it is clear that the power to establish and revise the substantive maritime law is lodged exclusively in Congress and the federal admiralty courts, there is no constitutional restriction on the power of Congress to make admiralty causes of action concurrently enforceable in state courts and in federal courts on the civil side.

No exception to the general applicability of the Federal Rules of Civil Procedure is warranted with respect to Rule 25(d). Compensation orders can be judicially reviewed solely in injunction proceedings against the deputy commissioner. Since appropriate relief can be obtained only by compelling official action by a public officer, the applicability of the rule and its purpose is clear, regardless of how the review proceeding is characterized. That proceeding does not result in a simple declaration of status binding on all the world but places the defendant officer under a judicial command in relation to the operation of the judgment.

Rule 25(d) is not a substantive statute of limitations and hence is not beyond the power of the Supreme Court to prescribe the rules of practice and procedure governing cases in the district courts. The rule does not place a time bar on the enforcement of a right of action. In the instant case, that bar comes solely from the statute which created the right of action. The rule only places a time limit on a necessary procedural step, and not every provision which prescribes a period within which a procedural act is required or allowed to be done can be said to alter or affect "substantive" rights.

At any rate, if Rule 25(d) is either invalid or is not applicable to this proceeding, the judgment of dismissal must nevertheless be affirmed since the case would then be governed by the doctrine of abatement prevailing in the district courts prior to the adoption of the rule and the enactment of its predecessor statutes. This doctrine required abatement of an action to compel a public officer in regard to his official duties immediately upon the defendant's separation from office. The plaintiff was not permitted to substitute the suc-

cessor but was required to sue out a new writ against him, provided the cause of action was not then barred by the substantive statute of limitations. This doctrine is applicable to the instant case regardless of how the proceeding is characterized or which side of the district court is exercising jurisdiction.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT RULE 25(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS APPLICABLE TO STATUTORY REVIEW PROCEEDINGS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

A. The Federal Rules of Civil Procedure Are Expressly Made Applicable to These Proceedings.

At the outset, it should be noted that Rule 81(a)(6) of the Federal Rules of Civil Procedure provides that "these rules apply to proceedings for * * * review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act * * *." There is thus no question that the Supreme Court intended that the rules would apply to the proceeding in the instant case. As originally promulgated, the rules inadvertently provided the contrary, but in 1939 the Court ordered an amendment, made effective in 1941, to put Rule 81(a)(6) in its present form. See 7 Moore, *Federal Practice* ¶¶ 81.06 [4], 86.02 [2]. The reason for the amendment was explained in the Advisory Committee's Report recommending the change, reprinted at 60 Sup. Ct. CLV-CLIX. Since § 921 of the Act provides for suits in equity to enjoin enforcement of compensation orders and suits to compel obedience to such orders, the old equity rules of procedure would govern such suits, rather than the new federal practice, if

Rule 81(a)(6) were allowed to remain in its original form (*e.g., Montagna* v. *Norton,* 28 F. Supp. 997, 1000 (D. N.J.)). The Committee was of the view that this anomaly should be done away with, and the Supreme Court, by ordering the amendment, expressed its agreement.

Appellants' attempted explanation of the amendment canont be supported (Br. pp. 13-14). The applicability of the Federal Rules to proceedings under the Act is clearly not limited to "common law actions," as distinct from review proceedings under § 921, since Rule 81(a)(6) expressly states that the rules shall apply to § 921 proceedings. As appellants point out, "the action herein was filed solely and exclusively pursuant to the statutory authority to do so conferred by Section 921(b) of the Act." (Br. p. 13). Regardless of how that statutory review proceeding is characterized, the Federal Rules are made applicable in express terms.

Appellants misread the opinion of this Court in *Rupert* v. *Todd Shipyards Corp.,* 236 F. 2d 559, as supporting their explanation.[2] In the *Rupert* case, this Court held that proceedings under § 921 could be brought on the admiralty side of the district court as well as on the civil side and that the amendment to Rule 81(a)(6) was not intended to deprive the admiralty courts of their concurrent jurisdiction over such claims. In this Court's view, the amendment was simply intended to implement those suits which were brought on the civil side, but there is no warrant for concluding, as appellants do, that the Court was attempting a distinction between "common law actions" and such civil suits. The only distinction made was

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[2] Further discussion of the *Rupert* case is made *infra,* pp. 9-10.

between civil review proceedings and those which were brought in admiralty. As to the former, the Federal Rules of Civil Procedure were made applicable by the 1939 amendment; the latter cases would continue to be tried in accordance with the rules established for other suits in admiralty.

Appellants' reliance on this Court's decision in *Kobilkin* v. *Pillsbury,* 103 F. 2d 667, affirmed, 309 U.S. 619, is equally misplaced for, as appellants note (Br. p. 11), the *Kobilkin* case was decided prior to the 1939 amendment to Rule 81(a)(6) and, therefore, at a time when the civil rules were expressly made inapplicable. The fact that the Supreme Court affirmed the decision after the 1939 amendment was ordered is of no significance since the amendment was not made effective until April 3, 1941, long after that litigation had come to an end. See 7 Moore, *Federal Practice* ¶ 86.02 [2]. Furthermore, it is unlikely that the amendment was intended to have a retroactive effect.

In short, the Supreme Court has made all of the civil rules of procedure applicable to the case at bar, which admittedly was brought on the civil side of the district court (Br. p. 7). There is no other possible interpretation of Rule 81(a)(6). Therefore, appellants' position depends on establishing that the Supreme Court exceeded its statutory or constitutional power in making such an application, or that for special reasons Rule 25(d) was not intended to be applied along with the other civil rules.

B. This Suit Admittedly Was Brought on the Civil Side of the District Court; Therefore, Under the Decision of This Court in *Haddock* v. *Pillsbury,* the Rules of Civil Procedure Must be Applied.

Appellants concede that the instant proceeding was brought as a complaint for injunction on the civil side of the district court and not as a libel in admiralty (Br. p. 7). They contend, however, as they must, that this procedure on their part was improper and that a review proceeding under § 921 of the Act can only be brought on the admiralty side of the district court since it involves the enforcement of an admiralty cause of action.

This contention is contrary to the decision of this Court in *Haddock* v. *Pillsbury,* 155 F. 2d 820, certiorari denied, 329 U.S. 719, which appellants do not cite. Under the *Haddock* case, review proceedings on the civil side of the district court are permissible and, when so brought, are governed by the rules of civil procedure. In that case, as in the instant one, a suit to set aside a compensation order and enjoin its enforcement was brought as a civil action. The judgment dismissing the complaint on the merits was entered in the civil docket in accordance with Rule 58 of the Federal Rules of Civil Procedure, and the time for noting an appeal began to run from that moment. The employer's notice of appeal was filed after the appeal period had expired under that procedure. The employer argued, as appellants do here, that a suit to review a compensation order was a suit in admiralty and that, accordingly, the judgment should not have been entered in the civil docket. This contention was rejected by this Court in a decision ordering that the appeal be dismissed. The Court held that, regardless of whether or not a compensation order is reviewable by

a libel in admiralty, it certainly could be reviewed in a civil action if the aggrieved party elected to do so and that in such a case, the suit must be governed by the rules of civil procedure. This Court recognized that, under settled doctrine, admiralty rights often are enforceable on either side of the district court and that, if the enforcement suit is brought as a civil action, it is governed by the civil rules. The Court noted that Rule 81(a)(6), as amended, expressly made those rules applicable to review proceedings under the Act.

In the same case, this Court further stated that it was unnecessary to decide whether review could also be obtained by a libel filed in admiralty. That question was subsequently answered in the affirmative in *Rupert* v. *Todd Shipyards Corp., supra,* on which appellants rely. In the *Rupert* case, the employer sought to enjoin enforcement of a compensation award by a civil action filed in accordance with § 921(b) of the Act. The district court transferred the case to the admiralty side. Both parties acquiesced in the transfer, and the case was accordingly tried as a suit in admiralty. In the district court, the employer prevailed. The employee filed a notice of appeal eighty days after entry of the final decree. The employer moved to dismiss the appeal as untimely on the ground that the thirty day appeal period for civil actions, rather than the ninety day period for suits in admiralty, applied. This Court denied the motion to dismiss and held that the transfer of the case to the admiralty side of the court, coupled with the acquiescence of the parties therein, made the proceeding one in admiralty. The Court reaffirmed its earlier implication in *Haddock* that review proceedings could be brought on either

side of the court at the election of the party aggrieved by the compensation order. The employer's contention that Rule 81(a)(6) deprived the admiralty courts of their concurrent jurisdiction over these claims was rejected. But the Court certainly did not hold that under the Act, the admiralty jurisdiction was exclusive; it only held that admiraly suits are permitted and that the rules of civil procedure are not applicable if review is sought in that way.

We recognize that there is language in the concurring opinion of Judge Matheurs in *Kobilkin* v. *Pillsbury, supra,* expressing the view that suits to set aside compensation orders must be brought in admiralty and cannot be brought as suits in equity. It is significant that Judge Matheurs felt constrained to write a concurring opinion in order to express this view, evidently believing that it was not part of the majority's decision. At any rate, the later decision of this Court in the *Haddock* case dispels any doubt as to that view's lack of vitality as the law of this Circuit. And, as noted *supra* p. 7, it is significant that the *Kobilkin* case was decided prior to the 1939 amendment to Rule 81(a)(6).[3]

The history of the passage of the Longshoremen's and Harbor Workers' Compensation Act and the landmark decision of the Supreme Court in *Crowell* v. *Benson,* 285 U.S. 22, sustaining the Act's validity as there

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[3] It should also be noted that the view of the Advisory Committee which recommended the amendment conflicted with that of Judge Matheurs. The Committee's recommendation was based on the belief that review proceedings could be brought as suits in equity and that, in the absence of the amendment, such suits would be governed by the old equity rules. 60 Sup. Ct. CLVIII. See also the decision of this Court in *Northwestern Stevedoring Co.* v. *Marshall,* 41 F. 2d 28, 29.

interpreted, do not support appellants' contention that review proceedings under the Act are within the exclusive admiralty jurisdiction. In *Southern Pacific Co.* v. *Jensen,* 244 U.S. 207, the Supreme Court held that state workmen's compensation statutes could not constitutionally be made applicable to maritime injuries, which would be tantamount to state regulation of suits to enforce admiralty causes of action. The grant of admiralty and maritime jurisdiction to the federal courts in Article III of the Constitution, coupled with the "necessary and proper" clause of Article I, meant that Congress and the federal courts had the paramount power to fix and determine the national maritime law and that the states could not affect that law if to do so would work harm to the policy of uniformity underlying the grant of power to the federal government. Subsequently, in *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, the Court held unconstitutional the congressional attempt to overrule the result in *Jensen.* The Court ruled that the substantive maritime law must be determined by either the legislative or judicial branch of the federal government and that this power could not be delegated by Congress to the legislatures of the states. Thus, even when state courts are permitted to enforce admiralty causes of action, they must be guided by a uniform federal rule and are not permitted to affect substantive rights.

Because of the gap which these decisions created in regard to maritime injuries, Congress passed the Longshoremen's statute. See Sen. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). In *Crowell* v. *Benson,* 285 U.S. 22, the validity of the statute was upheld. In that case, the suit to enjoin enforcement of a compensation order

was brought on the civil side of the district court and then transferred to the admiralty side. The Court sustained the jurisdiction of the admiralty court to determine the matter and held that Congress could properly invest it with the injunctive powers of a court of equity. But the Court did *not* hold that the jurisdiction to enforce the statute was exclusively in admiralty and could not be concurrently lodged in the federal courts on the civil side or in the state courts. The only requirement was that the substantive law be established either by Congress or by the federal admiralty courts; there was no constitutional restriction placed on the tribunals which Congress could designate in addition to admiralty for enforcement of that substantive law. That federal courts on the civil side have concurrent jurisdiction over review proceedings under the Longshoremen's statute is clearly the law of this Circuit. *Haddock* v. *Pillsbury, supra; Rupert* v. *Todd Shipyards Corp., supra.* There is nothing in the decision of the Supreme Court in *Crowell* v. *Benson* which is to the contrary.

The history of the Jones Act, 46 U.S.C. 688, and the decisions of the Supreme Court sustaining its validity, clearly establish that Congress can create this type of concurrent jurisdiction. In *Chelentis* v. *Luckenbach S. S. Co.,* 247 U.S. 372, a seaman brought suit against a shipowner to recover full damages for personal injuries caused by the negligence of a crew member. The suit was brought in a state court and removed to the federal court on the civil side on the ground of diversity of citizenship. The Court held that the seaman could not recover full indemnity since he was asserting an admiralty cause of action and his right in admiralty was limited to recovery for maintenance and

cure. This decision resulted in the passage of the Jones Act by which Congress extended to seaman the benefits of the Federal Employers Liability Act, under which the state and federal courts have concurrent jurisdiction. The validity of this statute and its grant of concurrent jurisdiction to state courts was upheld in *Panama R.R. Co.* v. *Johnson,* 264 U.S. 375, in which the Supreme Court rejected the argument that admiralty causes of action must be enforced exclusively in admiralty courts. The Court carefully distinguished between the exclusive federal power to alter the substantive maritime law and the determination of what tribunals would have jurisdiction to enforce that law. The only possible constitutional limitation is that the jurisdiction of the admiralty courts can not be entirely withdrawn, and the Jones Act was so interpreted in order to dispose of this difficulty. See also *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239.

In summary, this Court has held that suits to review compensation orders under the Longshoremen's Act can be brought on either the civil or the admiralty side of the district court and that this factor determines the rules of procedure to be applied in the particular action. The power of Congress to create this concurrent jurisdiction is clear from the decisions of the Supreme Court upholding the validity of this statute and the validity of the Jones Act. Therefore, appellants' characterization of the right of review as an admiralty cause of action does not sustain their contention that the proceeding is within the exclusive jurisdiction of admiralty, rendering Rule 25(d) of the Federal Rules of Civil Procedure inapplicable.

C. Since an Injunction Proceeding Against the Deputy Commissioner is the Only Method for Obtaining Judicial Review of a Compensation Order, Timely Substitution of the Commissioner's Successor in Office is Required.

Apart from their attack on the validity of Rule 25(d), appellants have advanced an additional reason why the rule should not be applied in a statutory review proceeding under the Act. In substance, they urge that this proceeding is not like the usual suit to enjoin a government official from exercising the powers of his office but is only a method for obtaining judicial review of an administrative order. The proceeding is analogized to civil suits brought for the declaration of nationality status in which this Court has held that Rule 25(d) does not apply.

This contention cannot be sustained, and the distinction between these proceedings and the nationality cases is clear. While it is true that the proceeding is brought to determine the validity of a compensation order, the fact remains that Congress has established as the only means for obtaining judicial review of such orders an injunction suit, mandatory or otherwise, against the commissioner making the award. Thus, the aggrieved party can have an order set aside only by obtaining coercive relief against a public officer. In such circumstances, the action to compel him to discharge his duty, or to refrain from doing so, abates when the official dies or retires from office. *Snyder* v. *Buck,* 340 U.S. 15. The history and purpose of Rule 25(d) demonstrate its applicability to the instant proceeding.

Rule 25(d) is the modern version of legislation originally adopted by Congress in 1899 (30 Stat. 822) in response to a suggestion of the Supreme Court in *United States ex rel. Bernardin* v. *Butterworth,* 169

U.S. 600. See H. R. Rep. No. 960, 55th Cong., 2d Sess. (1899). Prior to the 1899 statute, the history of writs sued out against federal officers to compel performance of official acts clearly established that the death, resignation, or expiration of the term of office of the defendant *pendente lite* compelled the action to abate and forced the plaintiff to sue out another writ against the new incumbent.

Almost ninety years ago, the Supreme Court, in a suit against a Secretary of the Interior, recognized that "[w]hen he resigned, of course the suit abated." *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313. This ruling was uniformly followed in all other cases reaching the Court which concerned the same question. *United States* v. *Boutwell,* 17 Wall. 604, 609; *Commissioners* v. *Sellew,* 99 U.S. 624, 626; *United States* v. *Schurz,* 102 U.S. 378, 408; *Thompson* v. *United States,* 103 U.S. 480, 484; *United States* v. *Chandler,* 122 U.S. 643; *United States ex rel. International Contracting Co.* v. *Lamont,* 155 U.S. 303, 306; *United States ex rel. Long* v. *Lochren,* 164 U.S. 701. And, as early as 1897, it was noted that the principle of abatement because of resignation from office had already "for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published." *Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28, 31.

The reason for the rule is that resignation from office means that the officer "no longer possesses the power" to perform the official act demanded of him. *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313. Since his duty to perform that act "exists only so long as the office is held, the court cannot compel [him] to perform it after his power to perform has ceased." *United*

States v. *Boutwell,* 17 Wall. 604, 608. In short, the rationale of the rule of abatement, which deprived a plaintiff of relief because of succession in office, was that the defendant officer's resignation rendered him powerless to perform the required official act. And since a judgment against an ex-officer directing him to perform the act would be futile and ineffective, the abatement or prevention of the continuation of the action would be warranted.

United States ex rel. Bernardin v. *Butterworth, supra,* was such a suit. It sought to compel the Commissioner of Patents to issue a patent. Obviously, this was the type of act the Commissioner could be forced to perform only as long as he held office. Consequently, in line with its earlier holdings in similar coercive relief cases, the Supreme Court abated the action on the Commissioner's death. At the same time, the Court suggested the need and desirability of a statute which would prevent abatement and allow an action, in which coercive relief was sought against an officer, to continue against his successor.

Soon thereafter, the 1899 statute was enacted allowing the continuation of an action after the incumbent officer's separation from office, provided a timely substitution was made. This statute was replaced by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941, 28 U.S.C. 780 (1934 ed.)) which effected a substantial change. See *Snyder* v. *Buck, supra* at 19. The provision that no action should abate was eliminated and it was simply provided that an action could be continued against a successor in office if the requisite showing of necessity was made within the stated period. Thus, "the 1925 Act made survival of the action dependent on a timely substitution." (*Ibid.*).

This statutory rule was embodied in Rule 25(d) of the Federal Rules of Civil Procedure, with minor modifications. When the Judicial Code of the United States was revised in 1948, Section 11 of the 1925 Act was omitted from the revision for the stated reason that the same ground was covered by Rule 25(d). See H. R. Rep. No. 308, 80th Cong., 1st Sess. A. 239 (1948). Thus, the 1899 statute, its 1925 revision, and the present version appearing in Rule 25(d) all require substitution within the period fixed by the statute or rule whenever the action is one in which coercive relief is sought against the defendant officer.

Appellants rely on the decision of this Court holding that Rule 25(d) was not applicable to a suit brought to determine the plaintiff's nationality status. *Acheson* v. *Fujiko Furusho,* 212 F. 2. 284; accord, *Chew Yin* v. *Acheson,* 216 F. 2d 60 (C.A. 7); *Tom Wing Po* v. *Acheson,* 214 F.2d 661 (C.A. 10); *Lehmann* v. *Acheson,* 214 F. 2d 403 (C.A. 3). Such suits are authorized by statute to be brought by a person claiming to be a national and who has been denied a right of a national by any government department or agency. The action, brought against the head of the department or agency, is for a judgment by the court declaring the plaintiff's status. No order, mandatory or otherwise, is issued to the defendant officer. This Court held that substitution of the defendant's successor in accordance with Rule 25(d) was not required since the purpose of the rule was not applicable to such a proceeding. The rule applied "only when a governmental officer, a defendant in a case in which it was sought to compel him to do or not to do an act within the sphere of his duty, was separated from the office and he was therefore powerless to perform." 212 F. 2d at 289. There

was no reason to extend the rule, however, "to actions wherein the judgment merely adjudicates the nationality status of the plaintiff which, by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment. * * * [I]t does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction." 212 F. 2d at 292.

In contrast to this type of proceeding, a suit to review a compensation order under § 921 (b) of the Longshoremen's statute is in the form of an injunction proceeding, mandatory or otherwise, brought against the deputy commissioner making the order. The order can be set aside only by a decree from the district court restraining him from enforcing it, and, of course, this is the type of relief which the appellants sought in the instant case (R. 15-16). The proceeding is for the enforcement of a claim which relates solely to a power attached to the office. Cf. *Snyder* v. *Buck, supra.* The district court can compel compliance with its decree only as long as the defendant commissioner is in office and able to perform the act which the court directs shall be performed. But the injunction, mandatory or otherwise, does not reach the office—it is a personal order to the defendant. Since the personal duty exists only as long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. It necessarily follows that upon his separation from office, the action must abate. *E.g., Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28.

The distinction between the nationality status cases and a suit to review an administrative order concerning

a compensation award was recognized and given effect in a recent decision of the Court of Appeals for the Third Circuit. *Poindexter* v. *Folsom,* 242 F. 2d 516. In that case, the plaintiff's claim for benefits under the Old Age and Survivors' Insurance Benefits Act had been denied by a referee and the Appeals Counsel of the Department of Health, Education, and Welfare. Her suit was brought as a statutory proceeding in the district court to review the administrative decision denying her claim. The proceeding is thus analogous to a review proceeding under the Longshoremen's statute, except the latter is expressly in the form of an injunction suit while the former is simply in the form of a "civil action" against the Secretary of the Department. The plaintiff had failed to substitute the Secretary's successor within the six-month period prescribed by Rule 25(d), and the Court of Appeals held that the action had abated notwithstanding a stipulation between the parties by which they had attempted to extend the period. The same court had followed the decision of this Court in the nationality status cases and had held that Rule 25(d) was not applicable to those suits. *Lehmann* v. *Acheson, supra.* But the court rejected the plaintiff's contention that a suit which is essentially one to obtain judicial review of an administrative order should be given like treatment. It recognized that while the purpose of the rule of abatement did not apply when only a declaration of status is sought, it did apply when the plaintiff seeks a direction to a public officer to compel him to do something or to refrain from doing something. The court declared (242 F. 2d at 519):

> * * * While it may be argued that the plaintiffs seek here a declaration that Doris Poindexter has

> the legal status of Jerome Poindexter's widow and that this would be analogous to a declaration of nationality, * * * a declaration by this tribunal or by the court below or by the referee in respect to Doris' status as Jerome's widow would not be such a determination as would stand against the world as would an adjudication of nationality. What the plaintiffs really seek here is a judgment which would direct the Secretary of the Department of Health, Education and Welfare to pay the plaintiffs benefits claimed * * *.

Similarly, what the appellants seek here is not a declaration of status but an injunction against the deputy commissioner restraining him from exercising his statutory power to enforce his order. The commissioner's separation from office requires abatement of the action because his retirement has rendered him powerless to insure that the official act sought to be restrained is not committed, and the court is necessarily without power to compel the defendant in this regard. In order for appellants to have obtained the relief which they seek, it was necessary for them to make a timely substitution of the commissioner's successor.

II

RULE 25(d) IS NOT A STATUTE OF LIMITATIONS AND WAS VALIDLY PROMULGATED PURSUANT TO THE SUPREME COURT'S POWER TO PRESCRIBE THE PRACTICE AND PROCEDURE OF THE DISTRICT COURTS

In Point I we have shown that the Federal Rules of Civil Procedure have been made applicable to review proceedings under § 921 (b) of the Longshoremen's and Harbor Workers' Compensation Act, at least when such a proceeding is brought on the civil side of the district court, and that no exception is warranted with respect to Rule 25(d) requiring that the successor of a public

officer be substituted within six months after the official's separation from office. We will now show, contrary to appellants' contention, that the Supreme Court's promulgation of a rule requiring substitution is valid and must be given effect.

Appellants have argued that Rule 25(d) operates as a statute of limitations and, as such, is invalid since it affects substantive rights. Appellants are, of course, correct that in prescribing the rules of practice and procedure to be followed in the district courts, the Supreme Court may not "abridge, enlarge or modify any substantive right * * * ." 28 U.S.C. 2072. It is also true that for most purposes statutes of limitation are considered to be "substantive" rather than "procedural" in nature. See *Guaranty Trust Co.* v. *York,* 326 U.S. 99. But it is perfectly clear that not every time limitation which is applicable to a law suit operates as a substantive statute of limitations. There are many time limits contained in any code of civil procedure which prescribe a period within which certain acts are required or allowed to be done, and inevitably these limits have an effect on a litigant's substantive rights. Thus, under the Federal Rules of Civil Procedure, a motion for judgment n.o.v. must be made within ten days after the reception of a jury verdict (Rule 50(b)), a motion to amend findings must be made within ten days after entry of judgment (Rule 52(b)), a similar time limit is placed on the motion for a new trial (Rule 59(b)) and the motion to alter or amend a judgment (Rule 59(e)), a motion to be relieved from a final judgment on certain grounds must be made within one year after entry of judgment (Rule 60(b)), and a record on appeal must be filed with the court of appeals within ninety days from the time

the appeal is taken (Rule 73(g)). Under Rule 6(b), none of these time periods can be enlarged by the district court, so that failure by a party to take timely action results in the particular remedy which the rule affords becoming unavailable to him. And it is apparent that ultimately this failure may determine the outcome of the particular litigation.

The effect of the time limits contained in Rule 25 for substitution of parties is no different from the effect of these other time periods in this regard. Failure to substitute within the prescribed time results in the loss of the right of substitution, but failure to make timely motions as prescribed also results in the loss of the particular relief sought. All of these rules differ from substantive statutes of limitations. The latter do not simply affect remedial procedures but put a limitation on the time within which a cause of action may be asserted. "Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law." *Christmas* v. *Russell,* 5 Wall. 290, 300. In short, the statute of limitations extinguishes the claim and puts it to rest—it operates as a "statute of repose."

This distinction is illustrated by the claim which appellants have asserted in the case at bar. Their failure to make a timely substitution of the successor to the deputy commissioner who made the compensation order in question must result in the action abating as to that commissioner. But there is nothing in Rule 25 or any of the other rules of procedure which prevents appellants from instituting a new action against the successor in office from whom effective relief could

be obtained. They are prevented from doing so solely by virtue of § 921 (a) of the Longshoremen's Act which provides that a compensation order becomes final within thirty days after it is filed unless judicial relief is sought prior to that time. The statute of limitations on appellants' claim is thus contained in the same statute which created their right of action and not in any of the Federal Rules of Civil Procedure. The event which makes substitution necessary is the commissioner's separation from office and not any of the requirements of the rules. Rule 25(d) only requires that that substitution be made within six months. It is the substantive statute which prevents a new action from being instituted. Certainly, it cannot be argued that the Supreme Court is powerless to prescribe any time limitations in the rules of procedure, not grounded on a statutory basis, by virtue of the fact that those rules cannot alter substantive rights. But that is the effect of appellant's contention with respect to the time limits contained in Rule 25. That contention should be rejected for the simple reason that Rule 25 does not put a time bar on appellants' right of action but only requires that they perform certain acts within a particular time in the course of enforcing that right of action.[4]

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[4] Although there is language in the opinion of the Supreme Court in *Anderson* v. *Yungkau*, 329 U.S. 482, to the effect that the time limits in Rule 25 operate as a statute of limitations, the Court was not there concerned with the problem under discussion here, and that language should not be read out of context. That case dealt only with the question of whether the district courts had discretion to enlarge the Rule 25 time periods, and the Court held that the rule operated as a mandate to dismiss the action if it was not revived in time.

The decision of the Court of Appeals for the Fifth Circuit in *Perry* v. *Allen*, 239 F. 2d 107, supports appellants' contention, but

III

IF FOR ANY REASON RULE 25(d) IS NOT APPLICABLE TO THIS PROCEEDING, THE JUDGMENT OF DISMISSAL MUST NEVERTHELESS BE AFFIRMED, SINCE IN THE ABSENCE OF THE RULE THE ACTION ABATED IMMEDIATELY UPON THE DEPUTY COMMISSIONER'S SEPARATION FROM OFFICE

For the reasons stated, we believe that the district court correctly applied Rule 25(d) to this proceeding. However, regardless of the merit of appellants' attack on the validity of the district court's action, they nevertheless cannot succeed in their endeavor to avoid the result of the failure to substitute the deputy commissioner's successor as a party defendant.

If Rule 25(d) either is not applicable or cannot be given effect because of its invalidity, it is apparent that the case would be governed by the doctrine of abatement which prevailed prior to the adoption of the rule, and prior to the enactment of its predecessor statutes which have since been repealed. No other result is possible. There is no other rule of law which the court could apply. The Act of 1899, the Judiciary Act of 1925, and Rule 25(d) all had the effect of alleviating the strict rule of abatement which previously was settled doctrine. The statutes and the rule were designed for that very purpose. As we have noted, early in the history of writs sued out against federal officers to compel or restrain performance of official acts, it was established that the separation from office of the defendant official *pendente lite* compelled the action

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in our view is wrong and should not be followed. It is, of course, true that all of the cases which have applied Rule 25 since the revision of the Judicial Code in 1948 impliedly sustain the validity of the rule. It should also be noted that in this Court's opinion in *Acheson* v. *Fujiko Furusho*, *supra*, in which the Court engaged in an elaborate discussion of the history of the rule, no question was raised by the Court with respect to its validity.

to abate and forced the plaintiff to sue out another writ against the new incumbent. See cases cited *supra,* pp. 14-17. And the action abated immediately upon the defendant's removal from office without an opportunity to continue the action against his successor by a substitution of parties, since the successor had to be afforded an opportunity to determine for himself whether or not the official act in question would be performed. It made no difference whether the plaintiff sought relief by a common law writ of mandamus or by a bill in equity for an injunction, mandatory or otherwise. *Miguel* v. *McCarl,* 291 U.S. 442, 452; *Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28, 33. In either event, the plaintiff was seeking relief by compelling certain official action and, therefore, the purpose of the rule had equal applicability. Official action could not be compelled from a defendant who no longer possessed the power to respond to the court's decree, and no other defendant could be brought before the court in the same proceeding. In the absence of a contrary statute or rule of procedure, the same principle must be applied to the instant case.

While appellants do not deal specifically with this problem, it is apparent that they would attempt to answer it by reiterating their contention that the instant proceeding is within the exclusive jurisdiction of admiralty and that the common law rule of abatement, which does not permit revival of the action against a public officer's successor, would not apply in an admiralty proceeding (Br. p. 9). But, as we have already demonstrated *supra* pp. 8-13, this Court held in *Haddock* v. *Pillsbury, supra,* that suits to review compensation orders can be brought on the civil side of the district court, as well as the admiralty side, and that

when they are so brought, the proceedings are tried as civil cases. And the rule of abatement applies whether the action is at law for a writ of mandamus or in equity for an injunction. The premise of exclusive admiralty jurisdiction which underlies appellants' argument does not withstand analysis and is contrary to authority; their conclusion must fall with it.

Even if appellants are correct that the instant suit must be tried on the admiralty side, the rule of abatement would still be applicable as in a suit at common law. The doctrine of abatment is not unknown in admiralty practice. Under the general maritime law, as at common law, a right of action *in personam* to recover for personal injuries abated upon the death of the person injured. *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U.S. 367, 371. If either party died, his personal representative could be substituted to prosecute or defend the action only if the cause of action survived by operation of law. See 2 Benedict, *Admiralty* § 357; cf., *Just* v. *Chambers,* 312 U.S. 383.

Of course, a contrary rule obtained if the proceeding were an *in rem* libel against a vessel. *The Lafayette,* 269 Fed. 917, 927 (C.A. 2). It is for this reason that the rule of abatement upon death of a party was often not applicable in admiralty cases. And for a similar reason, the rule of abatement of suits against public officers to compel official action would not be found in suits within the admiralty jurisdiction. In the absence of a statutory grant of power, admiralty courts do not have the power of equity courts to issue injunctions. *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454, 457-58. If a party seeks injunctive relief, he must turn to the state courts, or to the federal courts on the

civil side in a case of diversity of citizenship, and cannot look to the admiralty courts for this type of remedy even if the right of action being enforced is maritime in nature. See Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Columbia L. Rev. 259, 265. But it is clear that Congress can by statute invest admiralty courts with the power to issue injunctions, as it has done in the case of the Longshoremen's Act, and can "draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act." *Crowell* v. *Benson,* 285 U.S. 22, 49. When Congress confers equitable powers upon a court of admiralty and grants it power to issue an injunction, the usual rules of equity pertaining to the remedy are carried over into the admiralty court even though such rules do not usually apply in an admiralty suit. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U.S. 207, 217-18. Thus, when admiralty courts are given the power to enjoin official action of public officers, the same rule of abatement upon separation of the defendant from office applies as it would in a suit in equity to obtain the same relief. This is so simply because the reason for the rule of abatement is equally present regardless of which side of the court is exercising jurisdiction. For the same reason, it has long been settled doctrine that the common law rule applied on the equity side of the court in an injunction proceeding as it did on the law side in an action for writ of mandamus. *Warner Valley Stock Co.* v. *Smith, supra* at 33.

IV

APPELLANTS' REMAINING CONTENTIONS URGING REVERSAL OF THE JUDGMENT BELOW ARE CLEARLY WITHOUT MERIT

Appellants have advanced three reasons in addition to the matters discussed above in support of their argument that the district court's dismissal of the action was improper (Br. pp. 23-29). These contentions plainly lack substance and can be dealt with briefly.

1. The fact that appellants joined as a party defendant the employee whose injury was the subject of the compensation order in question does not save the action from abating for failure to substitute the deputy commissioner's successor. Under the statute, judicial review of a compensation order can be obtained only through an injunction proceeding against the deputy commissioner who made the order. There is no authority in § 921 for joining the employee as a defendant. The relief which appellants seek in this action cannot be obtained from him. As appellants have noted (Br. p. 13), this action was brought "solely and exclusively pursuant to the statutory authority to do so conferred by Section 921(b) of the Act," which contains the exclusive method for obtaining judicial review. The fact that the employee is empowered by § 921 (c) to apply to the district court for the enforcement of the compensation order does not change the fact that the statute only authorizes injunction suits against the commissioner to have the order set aside and its enforcement enjoined. It is true that as to the employee the action does not strictly abate, but since effective relief cannot be obtained from him, the suit against him alone does not state a claim for which relief can be granted and was, therefore, properly dis-

missed. *Warner Valley Stock Co.* v. *Smith, supra* at 35.

2. Appellants have argued further that the lack of a requirement in Rule 25(d) of notice of succession to public office renders the rule invalid as violative of the "due process" clause of the Fifth Amendment. We know of no principle of constitutional law which requires that a party be served with notice of the happening of all facts which might be relevant to the litigation. The cases which appellants rely on for this proposition only hold that a party's legal interests cannot be affected by a judicial or administrative proceeding unless he is given reasonable notice of the proceeding and an opportunity to be heard. No such lack of notice was involved in the instant case. And, of course, the same objection of lack of notice of succession to office is applicable to the common law rule of abatement which the federal courts have enforced since the beginning of our judicial history .

3. Finally, appellants complain of the fact that appellees' motion to dismiss on the ground of abatement was made one year and seven months after the case had been submitted to the trial judge for a decision on the merits, so that the six-month period of Rule 25(d) expired while the case was *sub judice.* While we sympathize with appellants' concern over this type of delay in decision, that fact is not material to the questions presented by this appeal and does not excuse appellant's failure to make the necessary substitution of parties. The reason for the case continuing to be in litigation at the time of the defendant's separation from office does not bear on the requirement of substitution, and this is true even if, as in *Snyder* v. *Buck,*

340 U.S. 15, the delay is due to continuing action on behalf of the defendant subsequent to his death or resignation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below dismissing the action as abated should be affirmed.

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